PALLDAS ARUMUGAM

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL APPEAL NO. 52-36-86]
5 MARCH 1987

CRIMINAL LAW AND PROCEDURE: *Firearms (Increased Penalties) Act - Charges for possession of firearm and ammunition - Discrepancy of dates in charge - Whether charge amended and charge or charges read over and explained to appellant again and plea taken - Right to recall witnesses to amended charge or charges.*

EVIDENCE: *Question of bad character - When permitted s. 54 Evidence Act 1950 - Whether fatal to case - Communication between spouses during marriage - Whether evidence - Section 122 Evidence Act 1950 - Information leading to discovery - Whether information by 3rd party which led to discovery of weapon admissible - 3rd party not called as prosecution witness but offered to defence.*

EVIDENCE: *Accomplice - Evidence of accomplice - Whether any evidence connecting appellant with ammunition - Witness did not report to police offence was committed - Whether makes witness an accomplice.*

EVIDENCE: *Extraneous Evidence - Cautioned statement not tendered in evidence and admitted as exhibit - Whether Court permitted to take into consideration extraneous evidence not tendered or adduced in Court.*

This was an appeal by the appellant against his conviction and sentence imposed by the President Sessions Court in respect of offences under s. 8 of the Firearms (Increased Penalties) Act, 1971 for possessing of a firearm and under s. 8 Arms Act 1960 (Revised - 1978) for possession of ammunition. The prosecution had applied to amend the date of the charges at the close of the prosecution's case but the amendment was not recorded.

Held:

[1] The testimony of the appellant's wife was inadmissible under s. 122 of the Evidence Act 1950 which prohibits communication between spouses from being adduced unless the spouse had agreed.

[2] There was no record that the date and time on the charges was amended. If the amendment was allowed, there was no record that the amended charge had been read over to the appellant and his plea taken as required by ss. 158(i) & (ii) and 162, Criminal Procedure Code. If the amendment was not allowed, there was no evidence to support the date and time as indicated in the charges.

[3] The information given by the third party to the police as to the place where the said firearm and possession were found was not admissible as against the appellant under s. 27 Evidence Act 1950. The third party was not called as a witness and his statement was hearsay and not admissible under s. 60 Evidence Act 1950.

[4] The lower Court took into consideration extraneous evidence *viz*. a cautioned statement by the third party which was not tendered as an exhibit.

[5] The lower Court had taken into consideration evidence which was inadmissible.

[Appeal allowed]

Cases referred to:
Abdullah Zawawi v. PP [1985] CLJ (Rep) 19
In re Krishnan Naidu [1953] AIR Madras 400
Satish Chandra Seal & Ors. v. Emperor [1945] AIR (32) Calcutta 137
Krishnan s/o Ramar v. PP [1987] CLJ (Rep) 145

Legislation referred to:
Arms Act 1960 (Revised-1978), ss. 4, 8(a)
Criminal Procedure Code, ss. 158, (i), (ii), 162
Evidence Act 1950, ss. 27, 30, 54, 60, 122
Firearms (Increased Penalties) Act 1971, s. 8

For the appellant - J. Nadchatiram
For the respondent - Mohd. Zaki bin Md. Yasin, DPP for PP

JUDGMENT

Mustapha Hussain J:

The appellant was charged in the Sessions Court, Seremban, with the following offences:

1st Charge

> That you on 14 April 1984 at about 10 a.m. in an unnumbered house at the 9½ mile Seremban - Mantin road, in the District of Seremban, in the State of Negeri Sembilan, did have in your possession a firearm, to wit, a .38 "Smith & Wesson" revolver, and that you have thereby committed an offence punishable under s. 8 of the Firearms (Increased Penalties) Act No. 37 of 1971.

2nd Charge

> That you on the same date, time and place, did have in your possession ammunition, to wit, 15 rounds of .38 special calibre without a licence granted to you under the provisions of s. 4 of the Arms Act No. 21 of 1960 (Revised- 1978), and that you have thereby committed an offence punishable under s. 8(a) of the said Act.

The appellant was found guilty of the two charges, convicted and sentenced to eight years imprisonment and six strokes of the rotan on the first as well as on the second charge, sentences to run concurrently. He has now appealed against the conviction and sentence.

Originally, the appellant's case before the Sessions Court numbered as Arrest Case No. 25 of 1984, was jointly brought before the Sessions Court with another Arrest Case No. 26 of 1984 on 14 August 1985 when the prosecuting officer applied for joint trial. The application for joint trial was opposed by the defence and the learned President disallowed the application and so only Arrest Case No. 25 of 1984 against the appellant proceeded.

The case for the prosecution against the appellant before the Sessions Court was unfolded by PW4 Inspector Sakar of CID Seremban. Inspector Sakar said that on 17 April 1984 (not 4 November 1984 as wrongly typed in the notes of evidence - and this is confirmed by both the DPP and Counsel for the appellant at the hearing of this appeal) he and some other police personnel went to appellant's house in the morning. He said in examination -in-chief **"The purpose of going there was to arrest Palldas regarding robbery case in Mantin also having possession of firearm".** The house was searched and no firearm was recovered. A drawer-table (which has no drawer), facing the wall in the kitchen was also searched. Inspector

Sakar used light and kerosene lamp to search this table P9 in particular. This was about 4.30 in the morning. By "light" probably Inspector Sakar meant "torchlight". The appellant was arrested and probably taken to the police station (though there is no evidence to this effect). What is important here is that Inspector Sakar said **"We did search the house. I did not recover any firearm"**. Some police officers were left around the appellant's house to **"observe the house"**. All these were in the early hours of 17 April 1984.

That night of 17 April 1984 at about 10 p.m. to 11 p.m. the police personnel who were keeping observation of the house, saw a Chinese man named Chin Keat Shin coming into the house but before he could enter the house, the police arrested him. On being questioned this Chin Keat Shin (hereinafter referred to as "Chin") led the police directly to the kitchen of the house where Chin told the police the pistol and bullets were kept in the table P9. After taking out the plank Inspector Fauzi bin Zakaria (PW1) saw a towel and taking out the towel there was a package containing the revolver and an ink box containing the ammunitions. (See photograph P1A of the exhibits with the towel in the table - the white towel could be easily seen if a torchlight was shone under the table). Chin also said the appellant had the revolver and bullets there, saying "**Saya tahu Paladas (the appellant) ada simpan satu pistol. Saya boleh tunjok**".

This Chin was not called to give evidence by the prosecution but was offered to the defence.

Another prosecution witness Manoharan (PW2) a close friend of the appellant gave evidence of his visit to appellant's house on 10 April 1984, (note here the appellant was arrested early morning on 17 April 1984. The date in the charge of possession is 14 April 1984. Whereas Chin led the police to recovery on 17 April 1984 at 10 to 11 p.m. at night), this Manoharan (PW2) visited the appellant at 8 p.m. together with Mohan. He took a drink and went to sleep. The appellant woke him up at about 10 p.m. and offered him some fried fish. PW2 then wanted to drink some water. The appellant was frying fish. Manoharan (PW2) said while he was in the kitchen the appellant showed him a revolver and put it on his palm. Manoharan testified that the revolver was similar and of the same weight as Exhibit P2. The bullets were not shown to him but was told that the bullets were kept at a different place. Manoharan also said, the appellant asked him to look for possible chances to steal or to rob. (To note here only the revolver was shown but not the bullets, which were said to have been kept elsewhere and to compare Inspector Fauzi's testimony that he also found an ink box containing bullets at the table P9).

That night of 10 April 1984 the appellant's wife named Gudi Kaur and appellant's mother-in-law and a 10 year old brother-in-law were also present in the house. At 10 p.m. when Manoharan woke up, appellant's wife Gudi Kaur and the mother-in-law were sleeping while the boy was watching television.

The star witness for the prosecution was appellant's 21 year old wife Gudi Kaur (PW3), a Punjabi, while the appellant is a Tamil. This witness, some how or other, gave evidence relating to what she saw and the conversation that took place between her and her husband. She said she married the appellant two years before when she was 19 years old. Appellant had been staying in her house (where the revolver and ammunition were recovered). Some sordid stories were also elicited from this witness. It was revealed that at one time she eloped with the appellant and that the appellant forced her into prostitution and that she was arrested by the Anti Vice Squad in Kuala Lumpur. She said "**in 1980 I ran away and he (appellant) eloped me**" (sic). The appellant forced her to marry him. Even after marriage the appellant used to ask her to be a prostitute but she did not agree. In the next breath this witness

professed that she still loved the appellant and went on to say that "after marriage I live decently with the accused" (i.e. the appellant). The crucial part of her evidence against her husband (whom she said she still loved) reads:

> On 10 April 1984 PW2 identified with another person came to my house on a m/cycle. Theycame about 8 p.m. They stayed for the night at my house. They left on 11 April 1984 around 8.30 a.m. The accused was also in the house.
>
> I know Chin Keat Shin identified. He is my husband's friend. He came in the after noon. He came to my house regularly. He came in the afternoon and follow my husband on m/cycle. They said they were going to Kuala Lumpur. They came back around 8 p.m. They went on one m/cycle which belonged to my husband. When they came back they went to my room. After a while Chin came out and he went back.
>
> I did not know what they were doing in the room.
>
> Then at night PW2 and his friend came to see my husband.
>
> On 11 April 1984 PW2 and his friend came again to my house. PW2 and his friend went back in (sic) the same night. They just had tea and left.
>
> At about 11 p.m. I was in the hall watching television. Then I heard a sound tat tat tat in my room. Then I went to peep what my husband was doing. The room was quite dark. I saw my husband was holding something black and he was holding a white towel. The accused saw that I was peeping. He came out of the room and kicking (sic) me. Then he asked me what I was looking at. He caught hold of me and brought me into the room. In the room the accused took a pistol and pointed at my head. He told me that he was having the said pistol. He threw on the bed. He said if somebody told the police about this he would kill me because he said that I was the only one who knew about that. Then he chased me out of the room.
>
> The pistol is black in colour. When he threw the pistol on the bed I saw it clearly. It is similar to this one (ID2). I don't know the different (sic) between pistol and revolver.
>
> The sound is similar to the sound when PO press the trigger of ID2 ...

It is to be noted that throughout the wife's testimony no one seems to have bothered about the prohibition imposed under s. 122 of the Evidence Act 1950.

The Police "Amarar" (sic) (PW5) testified that the revolver he was given to test-fire (with the ammunition) had the serial number **24223** at yoke and same number at the butt. On the internal part of the butt on the right there was a number **563144**. He confirmed that the revolver was **semicable** (sic) (probably the "amarar" meant "serviceable" when one refers to guns and revolvers).

Inspector Michael Chung (PW10) testified that Inspector Fauzi gave him the revolver and the ammunition. The Chemist's report P13 stated that the serial number was obliterated by filing and after being subjected to electro-chemical treatment the serial number read **J 533144**.

When the PO closed the case for the prosecution, he made available and offered 17 witnesses including Chin Keat Shin to the defence. After the defence had indicated it only wanted Indian and Singh witnesses, the "**PO applies to amended** (sic) **date and time to 11 April 1984 at about 11 p.m. on the charge. D/C no objections to amendment**." It is to be noted here that there is no record that the amendment to the charge (there were two charges in fact) was allowed nor is there record that the amended charge or charges were read over and explained to the appellant again and plea taken. There is also no record of the appellant being given the right to recall witnesses to the amended charge or charges.

Also to note from the appeal record (p. 4) that the date on the charge still remained as 14 April 1984 and in the grounds of judgment of the learned President (p. 31) also the date still stood at 14 April 1984.

Further it is to be noted that at p. 36 in the grounds of judgment, the sentence read:

> **6 years imprisonment ... and 6 strokes of rottan (sic) on each charge**, whereas on the charge sheet (p. 3) under particulars of sentence, the particulars reads:
>
> 8 years imprisonment ... and 6 strokes ...

Now to the grounds of appeal

(1) *Evidence of bad character*

Section 54 of the Evidence Act 1950 prohibits evidence of bad character to be adduced, unless it is in issue or there is evidence that the accused had a good character. This rule is meant to prevent prejudice or bias which may influence the minds of trial Courts.

In our case here, Inspector Sakar (PW4) during the examination-in-chief said "The purpose of going there was to arrest Paladas regarding robbery case in Mantin also having possession of fire-arm". Straightaway, if one were to hear this evidence that the police had gone to appellant's house to arrest him because there was a robbery case in Mantin and for possession of firearm, one would form the impression that the appellant was involved in the robbery and also in possession of firearm. This is highly prejudicial to an accused person during the trial. It is a question of law here. It is not known whether this piece of evidence had played a part in the mind of the learned President when he arrived at this decision and there is nothing in the grounds of judgment to indicate that the learned President had not taken or had ignored this prejudicial piece of evidence. One would have thought that Inspector Sakar (PW4) when giving evidence, in examination-in-chief, would only have said that acting on information, he and the police party had gone to appellant's house to arrest him and to search the house; that's all.

This ground by itself cannot be fatal if there is other evidence which is conclusive against the appellant and which can justify the conviction. After all the Courts do come across accused persons in trials before them who have already been convicted for some other offences, or who are facing some other charges in other Courts.

(2) *Communication during marriage*

Section 122 of the Evidence Act 1950 prohibits a spouse from giving evidence against the other spouse and shall not be permitted to disclose any such communication unless the spouse who made the communication consents thereto or except in suits between them or in proceedings where a crime has been committed by one against the other.

From the record of appeal, the appellant's wife Gudi Kaur (PW3) had, in examination-in-chief, given quite a lengthy evidence of all communications between herself and her husband. Though some of the evidence relates purely to acts, as distinct from words spoken, i.e., what she saw appellant was doing, it is so inextricably interwoven with what appellant had said to her, that to separate each act from words spoken by the appellant to her would be extremely difficult, if not impossible. Even if extricable and rejecting the words spoken, one would have their prejudicial effect still lingering.

Even though objection was not taken by the defence, this silence cannot convert what the law says is inadmissible evidence to be admissible. One would expect the wife's evidence to be led in such a way as to confine such evidence to what she saw the appellant doing. The wife should have been stopped the moment she started uttering what her husband said to her. From the record it would seem that nobody ever bothered about this s. 122.

(3) *Amendment to the charge.*

At the close of the case for the prosecution and after offering the remaining witnesses to the defence, the PO applied to amend the date and time of the charge to 11 April 1984 at about 11 p.m. (in the charge sheet as it stood, the 1st charge still shows 14 April 1984 at 10 a.m. even at this appellate stage). There was no objection from the defence. Nowhere in the record is there an indication that the date and time were indeed and in fact amended.

The appellate Court can only presume two things here. If the learned President had allowed the amendment, then there must be some indication somewhere that the amended charge was read over to the appellant and his plea taken with the note that the appellant had been given the opportunity of recalling any witnesses. (See s. 158(i) and (ii) and s. 162 of the CPC.). Secondly, if the trial Court had not allowed the application of PO to amend, then on the charges as they stood, the convictions cannot stand. This is simply because according to Manoharan (PW2) it was on the night of 10 April 1984 at about 10 p.m. that he saw the appellant with the revolver on his palm. Again, according to appellant's wife (PW3), it was on the night of 11 April 1984 at about 11 p.m. that she saw appellant with the revolver.

Up to this appellate stage, the charges annexed to the appeal record still show the date and time as 14 April 1984 at about 10 a.m. And even in the grounds of judgment on p. 31, the charges still stand with 14 April 1984 at about 10 a.m. Nowhere in the record of appeal can one find some events or evidence of possession by the appellant on 14 April 1984 at about 10 a.m. (in the morning).

(4) *Information leading to discovery*

Inspector Fauzi (PW1) gave evidence to the effect that Chin who was arrested as he was about to go into the appellant's house on 17 April 1984 had led Inspector Fauzi and a police party straight to the kitchen and showed the table and said the pistol was kept in a compartment in the drawer. Inspector Fauzi also said in evidence (in examination-in-chief) that Chin told him "**saya tahu Paladas ada simpan satu pistol. Saya boleh tunjok**." Chin was not called to give evidence but was offered to the defence which naturally did not use him.

Section 27 of the Evidence Act allows the evidence leading to the discovery of the offending exhibits, if the accused himself had led to the discovery. In our appeal here, it was not the appellant, but it was Chin, who led to its discovery.

This Chin, who was arrested, was detained in the same lock-up with the appellant. He is also facing a charge, probably connected with the appellant here. There was an application for that case to be tried jointly with the appellant's case but was objected to by his Counsel as well as appellant's Counsel, of course for very good reasons. There was allegation of Chin having sex with the appellant's wife and that he was also a police informer - see letter written by Chin's Counsel to the Court, Exhibit ID14.

Inspector Fauzi had related to the Court what this Chin had told him. Surely the best evidence would have been that of Chin himself from the witness box but then he was not called by the prosecution and was offered to the defence which was declined. The prosecution has

the right to call or not to call any witnesses. Since Chin was not called as a witness for the prosecution, what he had told Inspector Fauzi was merely secondary evidence which is caught by the hearsay rule. Section 60 of the Evidence Act lays down that oral evidence shall in all cases be direct. Clearly what Inspector Fauzi related as to what Chin had told him is indirect and secondary. Chin should have been called to give evidence, not the defence to supplement this defect, (see *Abdullah Zawawi v. Public Prosecutor* [1985] CLJ (Rep) 19 at p. 23). It was held *In re Krishnan Naidu* [1953] AIR Madras 400 in the trials of A and B, separate trials, statement of a witness in the trial of A that B had told the witness that A had stabbed the deceased, is hearsay of a dangerous character. **In any event, the information leading to the discovery by Chin is not admissible against the appellant here** - (see *Satish Chandra Seal and Others v. Emperor* [1945] AIR (32) Calcutta 137). Even if Chin and the appellant were jointly tried, Chin's information leading to the discovery under s. 27 read with s. 30 of the Evidence Act makes this evidence as against a co-accused very low in evidentiary value.

There is evidence that this Chin had frequented the house with the appellant on many occasions. Chin had led the police to the discovery of the pistol and ammunition. He knew the whereabouts and could himself take them out. Indeed he had the power of disposal.

(5) *Evidence of accomplice*

There is evidence of Manoharan (PW2) that the appellant had shown and put a revolver on Manoharan's palm. The revolver was heavy and of same weight as the revolver in Court (P2). This was on the night of 10 April 1984 about 10 p.m. Appellant did not show **any ammunition** or bullets to Manoharan - the bullets were kept in a different place. In the whole of the evidence whether admissible or inadmissible, there is no iota of evidence connecting the appellant with the ammunition, the subject of the second charge.

Now, to the charge of possession of the revolver. It is only Manoharan's evidence that has some reference to the appellant's possession, and this too, was on the night of 10 April 1984 at about 10 p.m.

Looking at the evidence as a whole, the house where the appellant was arrested and where the incriminating articles were recovered, has been frequented not only by the appellant (who sometimes stayed in Kuala Lumpur), but also his friends Chin, Manoharan and Mohan. A police constable named P.C. A. Rahman it seems also frequented the house. It would seem that the house was accessible to all and sundry. There must be something very attractive there to attract the denizens both of underworld and above.

If an appellate Court is allowed to dissect and separate the tainted and the inadmissible from those that are admissible and if this is done here, what do we have left? We have only the evidence of PW2 Manoharan, appellant's good old friend, who came with another man named Mohan who was not a friend of the appellant. Manoharan in his evidence said that on 10 April 1984, he and Mohan went to appellant's house at 8 p.m. They had a beer and went to sleep. They woke up at 10 p.m. and Manoharan went to drink some water. We do not know why he drank water, one would expect some urgent visit to the toilet to urinate after the consumption of beer. Manoharan said appellant cleaned the pistol and placed it on Manoharan's palm, it was black and heavy, similar to the revolver Exhibit P2. The ammunition, the subject of the second charge, was not shown to this witness but he was told where the ammunition was kept. Appellant had asked Manoharan to supply possible chances to steal and to rob.

Now, this Manoharan, when shown the revolver and had it placed on his palm, is he an accomplice? He knew it was an offence. He could be charged at least, with consorting, but was frightened. However, the fact that he did not report to the police does not make him an accomplice.

In his grounds of judgment, the learned President (at p. 32) said he did not agree with the defence submission that PW2 was an accomplice, because PW2 was scared to tell the police. The learned President also said because PW2 did not participate in concealing the revolver and did not know where the revolver was kept, did not make Manoharan an accomplice.

There is nothing wrong in accepting PW2's (Manoharan) evidence as he is not an accomplice. But if the charges were to be amended to 10 April 1984 at 10 p.m., then this Manoharan (PW2) would be an accomplice because he could be well charged with either possession or consorting. However, we are still left with the nagging doubt whether the revolver shown and put on PW2's palm, was the Exhibit P2 itself. There must be proof that this is so. And this was on 10 April 1984 whereas the charge as it stood referred to the date 14 April 1984 and even in the supposedly amended charge the date referred to was 11 April 1984.

(6) *Extraneous evidence in the grounds of judgment of learned President*

On p. 33 of appeal record, the learned President stated that Chin was understandably not called by the prosecution because Chin had a pending charge of consorting with the appellant with regard to the revolver P2. The learned President further stated that Chin had a vested interest in this case and if there was no case against the appellant then the charge against Chin could not stand.

From the record, it is known what this charge of consorting is all about. There is also a reference by the learned President to the cautioned statement when he said (at p. 35 of the appeal record) "**And yet he gave favourable cautioned statement 10 days later**". With respect, no cautioned statement was tendered in evidence and admitted as an exhibit and this Court is at a loss from whence the learned President surmised whether the cautioned statement was favourably given or not.

Conclusion

The Supreme Court in *Krishnan s/o Ramar v. PP* [1987] CLJ (Rep) 145 (Supreme Court Criminal Appeal No. 42 of 1984), a Seremban case, clearly stated that however heinous a crime a person is accused of, and if I may add, however despicable the accused may be, that despicable person can only be convicted on evidence produced in accordance with the stringent requirements of the law. Anything less will not be good enough, so said the Supreme Court.

In our appeal here, there had been several glaring instances of non-observance with the strict requirements of law. Highly prejudicial evidence of appellant being suspected of robbery and possession of firearm was introduced in examination-in-chief by the I.O., which by itself is not fatal.

Again, the wife's evidence of communication during marriage was also allowed in contravention of s. 122 of the Evidence Act.

There was failure to call Chin as a witness to testify instead of Chin's purported statement being related by Inspector Fauzi, rendering the evidence so adduced as hearsay. This is also a point of law contravening s. 60 of the Evidence Act. On top of this, under s. 27 of the Evidence Act, it was Chin who led the police to the discovery of the incriminating exhibits,

which has nothing to do with the appellant and **is inadmissible against the appellant**. Indeed on 17 April 1984, it was Chin who had the knowledge of the revolver and ammunition and where they were being kept; he had thus the power of disposal as he could have gone to the house for their disposal. He was a frequent visitor to this open-house.

Again, the amendment to the charge or charges was not made, nor was the appellant asked to plead to the amended charge. This is again a question of law, contravening s. 158 and s. 162 of the CPC.

With all these glaring infractions of the law, with all the errors and the confusion in the dates and time, not to mention the many errors in the record, can one safely say that the appellant here had a fair and proper trial, in accordance with the stringent requirements of the law? Clearly the answer is in the negative. The conviction cannot stand at all.

In the circumstances, the appeal is allowed. The convictions and sentences imposed are quashed.

Also found at [1988] 1 CLJ 661